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Dixie S. Cox v. Mervyn K. Cox : Brief of Appellant

Utah Supreme Court

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UTAH SUPREME COURT

BRIEF

of the State of Utah

DIXIE S. COX,
Plaintiff and Appellant,
vs.
MERVYN K. COX,
Defendant and Cross Appellant.

Case No. 13242.

BRIEF OF PLAINTIFF AND APPELLANT AND PLAINTIFF-APPELLANT'S REPLY BRIEF TO DEFENDANT-CROSS APPELLANT BRIEF.

APPEAL FROM JUDGMENT OF THE FIFTH JUDICIAL DISTRICT, DISTRICT COURT OF WASHINGTON COUNTY, HONORABLE J. HARLAN BURNS, PRESIDING

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STATUTES

In the Supreme Court of the State of Utah

DIXIE S. COX,
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vs.
MERVYN K. COX,
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BRIEF OF PLAINTIFF-APPELLANT AND REPLY BRIEF OF PLAINTIFF-APPELLANT TO DEFENDANT-CROSS APPELLANT'S BRIEF.

NATURE OF THE CASE.

The above entitled matter is a divorce action wherein Plaintiff-Appellant, referred to hereinafter as Plaintiff, alleged as grounds mental cruelty and asked for the care, custody and control of the four minor children born as issue of the parties subject to the Defendant having reasonable rights of visitation, an equitable division of the property accumulated during the marriage, reasonable child support, alimony, reasonable attorneys fees and costs of court. The Defendant and Cross Appellant, hereinafter referred to as Defendant, filed a Counterclaim seeking divorce alleging as grounds mental cruelty, asking for the custody of the minor children, seeking the creation of a Trust for the minor children and asking that Plaintiff receive no alimony.

DISPOSITION IN THE LOWER COURT

On February 9, 1973 the Lower Court awarded the Defendant a Decree of Divorce from Plaintiff on the grounds of

cruelty. After finding both parties capable of having the care and custody of the four minor children and expressing some concern about the Plaintiff's plans to relocate to the State of Idaho, the Court awarded the care and custody of the minor children to the Defendant until August, 1973. Thereafter and on the 5th day of October, 1973, the Court after full consideration of the record awarded the custody of the minor children to the Plaintiff subject to reasonable and full visitation rights by the Defendant.

Consistent with granting custody of the minor children to the Plaintiff, the Defendant was ordered to pay Plaintiff the sum of FIVE HUNDRED DOLLARS ($500.00) per month as child support. The Lower Court awarded to Plaintiff a property and alimony settlement in the total cash amount of $65,000.00, which amount was to be reduced to $60,000.00 if paid within six months, such sum being subsequently paid.

RELIEF SOUGHT ON APPEAL

Plaintiff and Appellant seeks modification of the division of property, child support payments and alimony and affirmation of the Lower Court's decision regarding child custody.

Reversal of the Lower Court's decision relative to the care, custody and control of the minor children as sought by the Defendant-Cross Appellant.

STATEMENT OF THE FACTS

The original complaint was filed by the Plaintiff, Dixie S. Cox on April 5, 1972 and an Amended Complaint was later filed on April 10, 1972.

The first Answer of the Defendant, Mervyn K. Cox was filed on August 9, 1972, and on October 30, 1972 an answer to the amended complaint and counter-claim was filed by the Defendant.

The evidence produced at a trial before the Court on January 10, 11, and 12, 1973 produced the following:

The Plaintiff and Defendant were married on June 16, 1961 in St. George, Utah, there having been born as issue of the marriage four minor children. *(Tr. 7)*

Following their marriage the parties moved to San Francisco where Dr. Cox pursued his Dental Program. *(Tr. 8, 380)*

During the time of Dr. Cox's attending Dental School the Plaintiff was employed in various capacities in an effort to meet their living expenses. *(Tr. 7,8)* Subsequent to the Cox's moving back to St. George, Utah in 1964, the Plaintiff worked in the Office of the Defendant as a Receptionist and Assistant for a period of three years and for a 8 year period subsequent to 1964 the Plaintiff was employed as a Bookkeeper for the Defendant at a salary of $350.00 per month, which amount was deposited in a Savings Account and as the Defendant's testimony indicated was utilized to purchase the Bentley-Sullivan Farm. *(Tr. 11,12,13,28,121,450,451)*

In the factual situation as outlined in the Defendant's Brief, there are numerous references to certain relationships with male companions; however, as the record clearly indicates, there was no testimony elicited which would indicate immoral conduct of the Plaintiff in the presence of the children.

During the time that Mrs. Cox was continuing her education at Dixie College, reference was made to an occasion when Dr. Cox found Mrs. Cox with another man in a parked car near the College Library. *(Tr. 106,390)* Upon cross examination, the Defendant admitted that they were sitting in the car talking and that he observed nothing which would indicate any impropriety. *(Tr. 431)*

On another occasion testimony was illicited relative to another man being in the Cox home clad only in Bermuda Shorts. *(Tr. 390)* The testimony further indicated that the man was a Hawaiian who was one of two renters in the Basement Apartment and that the renters often ate with the Coxes and were apparently welcome in the home. *(Tr. 431,432)*

The transcript further reveals a concerted effort by the Defendant to attempt to show that Plaintiff had neglected the children primarily by leaving them with Babysitters. During the month of June, 1972, Plaintiff was absent from the home for a ten day period of time. *(Tr. 90,122)* This ten day period of time was a time of sole-searching by mutual agreement of the parties to determine whether or not their martial difficulties could be settled. *(Tr. 89)* During this period of time, the Plaintiff kept in close touch with several people in an effort to determine the problems which the children might be experiencing.*(Tr. 89,90)* Proper arrangements had been made to secure the services of a qualified sitter for the children so that they were well cared for over that period of time. *(Tr. 435)* The testimony further indicated that the Plaintiff was particular about whom she selected to babysit the children and that she made every effort to insure there was adequate food in the house, that the children had extra spending money, that they had the names of individuals who they could contact for help and that a schedule was pre-

pared setting forth the respective days and time in regard to the schedule of each child. *(Tr. 126)*

The evidence proportedly disclosed that during a six month period in 1972 Mrs. Cox spent 80 out of 100 days away from the children, leaving the children on these occasions with babysitters. *(Tr. 301, 313, 322)* Upon cross examination, however, the witness who disclosed such evidence stated that on many occasions what she in fact termed to be babysitting were in fact occasions when the Plaintiff's children were playing with the witnesses children and that the babysitting frequently involved only short periods of time. *(Tr. 285,287,313)* This witness further testified that the Plaintiff and she were friends, and frequently exchanged babysitting services. *(Tr. 285)*

Reference is also made to a trip to Boise, Idaho in December of 1972 wherein Mrs. Cox stayed overnight with the children in a Mobile Home with her boyfriend. *(Tr. 101)* The seventeen year old sister of the Plaintiff accompanied Mrs. Cox to Boise on that occasion and there was no testimony which indicated that the Plaintiff conducted herself in an improper manner. *(Tr. 125)* Reference is also made to numerous other occasions and Mrs. Cox allegedly spent time with the same male companion. *(Tr. 96,98,99,101,114, 267-269)* As the record clearly indicates, however, the testimony received relative to these occasions did not establish that the Plaintiff categorically denied having stayed with this same man at the Tri-Arc Travel Lodge in Salt Lake City and there was no proof to the contrary. *(Tr. 93,94)* The testimony further indicated that on occasions when this same man stayed at her home in St. George, that he stayed in the guest room downstairs, such testimony being uncontroverted that nothing immoral took place between the parties. *(Tr. 94)*

Testimony at the Trial Court revealed that the defendant had been undergoing psychiatric care, having been diagonized as emotionally distressed and depressed and as part of the treatment was placed on a prescribed drug. *(Tr. 438)*

The evidence further disclosed that the Defendant expressed an unusal interest in female persons other than his wife. *(Tr. 438,439,450,452)* The Defendant testified that on or about December 10, 1972 he telephoned London, England ostensibly to speak with a former female employee in an effort to ascertain whether or not she would provide Defendant with an Affidavit as to their relationship. *(Tr. 452)* On another occasion, the Defendant in the absence of his wife proceeded to teach the Plaintiff's Sister, then 15½ years of age how to dance and proceeded to dance in such a manner to cause her to become uncomfortable and request to be taken home. *(Tr. 454)* The testimony further indicated that rather than taking her directly home, the Defendant parked the automobile and proceeded to kiss the young lady. *(Tr. 455)*

The evidence discloses that the older children have on occasion inquired as to *"why's Daddy treating us so mean,"* and that the Defendant has further upset the children in removing them from school during their reading period. *(Tr. 30,31)* Further testimony clearly established that the Plaintiff takes great interest in her children, in taking the children hiking and picnicing, participating in numerous other events with the children, and assisting them in their reading and studies. *(Tr. 234,235,240)* In fact, the Plaintiff was rather insistent that any plans she might have had would have to wait until she finished reading to the children and they finished with their studies. The witness who provided this testimony visited the Cox home at a frequency of approximately 2 or 3 times per week and testified

the house to be clean, the children well dressed and the meals balanced and nutritious. *(Tr. 240,241)*

The testimony of the Home Teacher indicated that the interior of the Cox Home, particularly the living room and kitchen were very clean on numerous occasions when he visited the Cox Home, including two occasions when he arrived unannounced. *(Tr. 457,458)* He further testified that the children were clean and well dressed and that there appeared to be harmony and love between Mrs. Cox and the children. *(Tr. 458)*

The evidence adduced at the trial court level established that the parties have accumulated since their marriage the following described real and personal property:

1. The Home located in St. George, Utah, having a value of as established by the Esplin Appraisal Service in the sum of $74,500.00, with approximately $500.00 due for improvements on said home at the time of the trial. *(Tr. 161,403)* This value was arrived at utilizing the market data approach, together with the replacement cost less depreciation and by comparison to comparable sales. *(Tr. 151, 152, 155, 156, 157, 159, 161)*

That the market date and comparable sales approach was also utilized in determining the value of the Bentley-Sullivan Farm which the Esplin Appraisal Service valued at $104,420.00. *(Tr. 161-165)* According to testimony given by the Defendant, there was an indebtedness of $22,000.00 owing on the Bentley portion of the Farm and $16,000.00 owing on the Sullivan portion of the Farm leaving a net value of $66,420.00. *(Tr. 407,408)*

Utilizing the comparable sales approach, the Syphus Farm

was appraised at a vlue of $181,000.00. *(Tr. 166-169)* The original purchase price of the property was $120,000.00, the parties owning an undivided one-third (1/3) interest therein. *(Tr. 405)* The Defendant testified that there was an encumbrance against the property in the amount of $104,000.00, the net equity interest of the parties based on one-third of the net equity of $77,000.00 being in the sum of $25,600.00.

By Stipulation of the parties it was determined that the one-third interest of the parties in the Car Wash Property had a value of $9,730.00. *(Tr. 147,148)* The parties further stipulated that the property referred to as the Service Station and Business Building Complex located at Kemp Corners had a value based on the Esplin Appraisal Report of $62,398.00. Counsel for the respective parties stipulated that the encumbrance due on the Kemp Corners Property was in the sum of $31,897.00, leaving a net value of $30,502.00 of which the parties own a one-half (1/2) interest valued at $15,251.00. *(Tr. 210,404)* Counsel for the respective parties stipulated as to the value of the Pine Valley Property at $3,200.00 and Kolob lots at $6,000.00. *(Tr. 148)*

The Defendant testified that the value of the parties one-seventh (1/7) equity interest in the Prince Medical Complex was in the sum of $10,000.00. *(Tr. 411)* The Defendant also testified as to the value of the 1972 Chevrolet Stationwagon in the amount of $4,500.00, the 1970 Buick Riveria Automobile in the amount of $2,000.00, the 1969 Ford Pickup in the sum of $1,500.00, the Boat and Trailer in the sum of $1,800.00, the one-fourth (¼) interest in an Airplane in the sum of $2,400.00, the 2 Snow Mobiles together with trailer in the sum of $1,000.00, the Trackster in the sum of $1,000.00, a Promissory Note from Howard Carter with an unpaid balance of $20,000.00 at 5% interest per annum, a Promissory Note from John Whitney with an unpaid balance of $30,000.00 with interest thereon

at the rate of 5% per annum, a Convertible Bond in the sum of $8,000.00, U & I Sugar Stock in the sum of $200.00, American Western Life Insurance Stock valued at $600.00, Freedom Holding Company Stock the value of which was unknown, a membership in the Bloomington Country Club having a value of $300.00, Dental Equipment situated within the Defendant's Office having a value of $6,000.00 and a Savings Account in the St. George Savings and Loan in the amount of $2,300.00. *(Tr. 410-415)*

Taking into consideration the respective values established by the evidence and stipulation of Counsel less the respective encumbrances, the property accumulated by the parties during the period of their marriage has a value of $292,101.00.

There was additional testimony concerning the Defendant's participation in a Keogh Retirement Plan; however, there does not appear any estimate as to the accrued value of the Plan at the time of the filing of the Complaint. *(Tr. 27)*

The uncontroverted testimony of the Plaintiff established that she and her children need approximately $1,019.00 per month to maintain the standard of living to which they have been accustomed. *(Tr. 26,27)* The testimony elicited in the Lower Court indicated that the Defendant, an Orthodontist, has a substantial annual income together with the properties set forth herein having substantial income producing qualities. *(Tr. 21,25,354,356,357,358,359)*

Subsequent to the trial, counsel for the respective parties, at the Trial Courts request, submitted Memorandums of Points and Authorities. On February 9, 1973, the Trial Court having some concern in regard to the propriety and judgment of some of the actions concerning a male companion of the Plaintiff and the

position that he placed the Plaintiff in, the Court awarded the temporary care, custody and control of the minor children of the parties to the Defendant and Counter-Claimant until the month of August, 1973. As the Court indicated the Plaintiff had testified as to her intention and desire to vacate Washington County and move to Boise, Idaho for the purposes of marrying the man as soon as such marriage might be legally possible. As a result thereof, the Court expressed concern about taking the minor children from Washington County in the immediate future and introducing them into a new home, Mrs. Cox having testified it was her intention to marry this man. *(February 9, 1973; (Tr. 4,5)* The Court further found that Mrs. Dixie Cox was a fit Mother; however, it was the desire of the Court to give her an opportunity to stabalize her life during the interim period of time, having in mind the presumption under Utah Law that the Mother is presumed to be the custodian of the children in the best interest of the children. *(February 9, 1973; 3,5)* The Court further ordered a property and alimony settlement payable to the Plaintiff, by the Defendant in the amount of $65,000.00, such amount to be secured by a First Lien on the Home belonging to the parties and provided that the property settlement and alimony payment was effected within six months it was to be reduced by $5,000.00, resulting in a $60,000.00 cash settlement. *(February 9, 1973 Tr. 6)* In addition, the Plaintiff was awarded the 1972 Stationwagon Automobile, together with her personal belongings and Defendant was ordered to pay Plaintiff the sum of $2,000.00 as and for attorneys fees and costs of court. *(February 9, 1973; Tr. 7)*

The Court further required that the Defendant pay Plaintiff the sum of $1,000.00 per month for a period of six months to assist Plaintiff in relocating to Idaho. *(February 9, 1973; Tr. 6)* The total sum of $6,000.00 was subsequently paid and on February 18, 1974 the balance of $54,000.00 paid by the Defendant to the Plaintiff was ordered placed in escrow by the Clerk of the

District Court pending appeal of the property settlement.

Following the consideration by the Lower Court of the Plaintiff's Motion for an in-kind distribution to Plaintiff of the assets of the parties in regard to awarding the Carter and Whitney Promissory Note proceeds and the Bentley-Sullivan Farm to Plaintiff, which testimony indicated was adjacent to a farm owned by the Plaintiff's Father *(Tr. 443)* and consideration of Plaintiffs and Defendants recapitulation on values of property holdings and Plaintiffs objections to the Findings of Fact, Conclusions of Law, and Interlocutory Decree of Divorce in regard to the Trial court's lump sum alimony and property award, the trial court on the 14th day of December issued a Memorandum Decision affirming the property settlement as set forth by the Court in its ruling of February 9, 1973. Without the benefit of a transcript, the Lower Court found the net assets of the parties subject to division and distribution to be in the sum of $209,743.00, which the Court rounded off to $210,000.00. *(Mem. Dec. 2)* The Court divided that sum by one-third which amounted to $62,762.76, awarding to Plaintiff a net property and alimony settlement of $65,000.00 together with the 1972 Station Wagon having an agreed value of $4,500.00 making a total award of $69,500.00. *(Mem. Dec. 2)* The Court further stated that in the event the Defendant elected to pay the cash award over a 10 year period at 7% interest per annum consistent with the previous Court Order entered on February 9, 1973, the value to Plaintiff would be approximately $90,540.00. *(Mem. Dec. 3)*

After referring to factors considered by the Court in making the property settlement award, the lower Court utilizing the recapitulation of assets submitted by the Plaintiff indicated that one-third of $290,000.00 would be in the sum of $87,087.00, which amount the trial court felt must be discounted by a maximum of one-fourth or a minimum of one-fifth. *(Mem. Dec.*

4) Discounting $87,087.00 by one-fourth the Court calculated the present day award or equity to be $65,135.00 and discounting $87,087.00 by the minimum of one-fifth the trial court determined the present day equity to be $69,670.00, both amounts which the trial court felt to be comparable to the $69,500.00 award made by the Court. *(Mem. Dec. 4)*

The Decree of Divorce was entered on December 24, 1973, the divorce having become final on that date pursuant to an order of the trial court made on October 5, 1973, neither party having appealed the granting the divorce. *(October 5, 1974; 27)*

A Notice of Cross-Appeal was filed by the Defendant Mervyn K. Cox on January 21, 1974. The Plaintiff filed a Notice of Appeal January 22, 1974.

ISSUES.

The issue presented in the Cross-Appeal concerns whether the trial court erred in granting the care, custody and control of the minor children to the Plaintiff — Mother, together with the attendant of the award of child support.

The issue raised on the Appeal by Plaintiff concerns whether the Lower Court erred in its ruling regarding the lump sum alimony and property settlement award.

ARGUMENT

POINT I

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN AWARDING CUSTODY OF THE MINOR CHILDREN TO THEIR MOTHER.

In divorce cases the trial court has considerable discretion in determing what is equitable, and, upon appeal, the decision of

the court as to child custody will not be reversed unless it is clear that there was an abuse of discretion. *Graziano* v. *Graziano,* 7 Utah 2d 187, 321 P.2d 931, (1958); *Sartain* v. *Sartain,* 15 Utah 2d 198, 389 P.2d 1023 (1964); *Sampsell* v. *Holt,* 115 Utah 73, 202 P.2d 550, (1949). The reason most often expressed for this rule is that the trial court is in an advantaged position to observe the witnesses and draw conclusions. As was said in *Sampsell* v. *Holt,* at 202 P.2d 554:

> *"We are not disposed to upset that finding. The trial court had the opportunity, as we do not, of seeing the parties and the witnesses, of observing their demeanor, and of forming opinions."*

Therefore, unless it can be shown that the mother is unfit, it is proper to leave the children in her custody.

A. The preferences in Utah is for children of tender years to remain with their mother.

The Court has often expressed the philosophy that children of a young age are better left under the mother's care than the father's. The Court has said that, all things being equal, the mother is in an advantaged position over the father when it comes to child custody. *McBroom* v. *McBroom,* 14 Utah 2d 393, 384 P.2d 961 (1963); *Steiger* v. *Steiger,* 4 Utah 2d 273,293 P.2d 418, (1956); *Briggs* v. *Briggs,* 111 Utah 488, 181 P.2d 223 (1947). Unless the mother is demonstrated unfit *to be a mother,* this preference exists.

B. The Plaintiff has not been shown to be unfit as a mother.

Several cases, both in Utah and elsewhere, have reached the conclusion that to be a good mother one need not be a good wife.

In *Ryan* v. *Ryan,* 17 Utah 2d 44, 404 P.2d 247 (1965), it is true that the Court upheld an award to the father. However, it was doing this in observance of the rule that, unless abuse of discretion is shown, the ruling of the trial court will not be upset on appeal. Although the evidence did show the wife had been engaged in love affairs, was continually away from home, and failed to care for the children, the Court did not deem this conduct immoral. At 404 P.2d 248, it said:

> *"While the evidence contained in the record before us does not seem to warrant the court's findings that the Plaintiff (wife) is an immoral person, he nevertheless had the parties before him, witnessed their dismeanor and could reasonably conclude that plaintiff was not a fit or proper person to have custody of the children. . . . While some other judge may have found otherwise we cannot say that the trial court acted unreasonably or abused its discretion."*

It is clear that the Court's decision was based on observance of the rule stated above. This is even more clear when it is remembered that in *Ryan* the father had been convicted of two serious felonies, and the Court wondered who cared for the children while he was in prison.

The proposition that one can be a good mother but a poor wife was expressed in *Dearden* v. *Dearden,* 15 Utah 2d 105, 388 P.2d 230, (1964). The Supreme Court in *Dearden,* without disturbing the District Court finding of adulterous conduct by the mother and the finding that she was frequently absent from home and in the company of other men, concluded that this did not exhibit any base, depraved or erratic attitude toward the child and refused to grant custody of the child to the father. In the case of *Stuber* v. *Stuber*, 121 Utah 632, 244 P.2d 650, (1952), the mother was living with a married man at the time of the trial. There, also, the Court upheld the award of custody of the

children to the mother. On the basis of *Dearden* and *Stuber*, the Court affirmed the decree granting custody of the children to the mother in the case of *Sparks* v. *Sparks*, 29 Utah 2d 263, 508 P.2d 531, (1973). In that case, the mother was living with another man, to whom she was not married, while she had custody of the children from her former marriage.

Even more forcefully in support of this position that a good mother can be a poor wife are cases where the mother's adultery is not merely suspected but actually proven. In *Cooke* v. *Cooke*, 67 Utah 371, 248 p 83, (1926), the wife was adjudged guilty of adultery by a Canadian Court. The Utah Supreme Court said that, though the Canadian decision as to adultery was to receive full faith and credit, it did not deprive the mother of custody of the children. At 248 P 102 it said:

> *"In this country the general rule is that a spouse, though found or adjudged guilty of adultery, will not, for such reason, necessarily be deprived of the care and custody of his or her children."*

Further, it was said that the unfitness which deprives a parent of custody must be positive, not contemplative or comparative. Our sister state of Nevada has expressly held that adultery will not disqualify the mother in custody matters. In *Cooley* v. *Cooley*, 86 Nev. 220, 467 P.2d 103, (1970), the Nevada court upheld an award of custody to the mother, even though she had lived with her paramour for a month, during which time the children, ages 8 and 10, were present in the home. In so ruling, the Court expressly overruled *Sisson* v. *Sisson*, 77 Nev. 478, 367 P.2d 98, (1961), where the Court had reversed the trial court's award of child custody to the mother under similar circumstances. In footnote 2 of *Cooley*, it was said:

> *"2. We expressly overrule any views in* Sisson, *supra, which may be inconsistent with those herein."*

In *Chase* v. *Chase*, 15 Utah 2d 81, 387 P.2d 556 (1963) the District Court ordered the custody of a 2½ year old boy previously granted to the mother to be granted to the father. In reversing the award of custody to the father the Supreme Court stated:

> *"Except for understandable human frailties, practically her only dereliction of consequence which might directly affect the child is that of leaving him with Plaintiff's mother, or in a nursing home, while she worked. This is not necessarily inimical to his welfare." Id. at 556.*

The Court further stated:

> *"It is a universally recognized principle, well grounded in reason and experience, that a child of such tender years should be in the care of his mother unless there is some substantial and compelling reason to deprive her of custody." Id at 556.*

The evidence in this case clearly does not demonstrate any substantial or compelling reason to deprive Mrs. Cox of custody of the children. The evidence has disclosed that Mrs. Cox has always taken great interest in the children and participated in numerous activities with them, including among others, hiking, picnicing, cooking and assisting them in their reading and studies. (Tr. 234,235,240) The evidence further indicated Mrs. Cox to keep the house clean, the children well dressed and serve well balanced and nutritious meals. (Tr. 146, 147, 240, 241, 457, 458)

The record clearly indicates the total lack of any conclusive

evidence demonstrating any immoral conduct on the part of the Plaintiff in the presence of the children.

Reference has been made to the numerous occasions when the children were left with babysitters, The testimony clearly indicates that on most occasions they were left with babysitters for only a short period of time, many times of babysitting being in reality only playtime with the neighbor children. (Tr. 285,287,313) Reference was further made to a 10 day period, which by agreement of the parties was a period of soul searching. (Tr. 89) The Plaintiff, contrary to the representations of the Defendant, kept in close touch with several people over that period of time to ascertain how the children were. At no time was it demonstrated that the Plaintiff was negligent in selecting babysitters to care for the children. On the contrary, the Plaintiff made every effort to insure there was adequate food in the house, that the children had extra spending money, that they had the names of persons who they could contact for help and that a schedule for each child was prepared to assist the babysitter. (Tr. 126) It is significant that during the 9 month period between the filing of the divorce and the trial that the Father did not institute any proceedings to secure temporary custody and was apparently satisfied that the children were being well cared for.

Many of the cases cited by the Defendant are distinquishable from the facts of the case at bar. In *Francks* v. *Francks*, 21 Utah 2d 180, 442 P.2d 937 (1968) the evidence demonstrated the Mother to have traveled about the streets late at night in an intoxicated condition and that the 11 year old child of the parties during the trial requested that his custody be awarded to his Father. Such a factual situation does not appear in this case. In *McBroom* v. *McBroom*, 14 Utah 2d 393, 384 P.2d 961 (1963) the

evidence indicated the Mother to use unseemly language in the presence of the children, to keep obscene materials within the reach of the children, leaving home on numerous occasions arriving home late and in an intoxicated condition, spending an inordinate amount of time in Taverns and persistently refusing and neglecting to engage in activities with the children. In the instant case such conduct on the part of the Mother clearly does not appear in the record. In *Hyde* v. *Hyde*, 22 Utah 2d. 429, 454 P.2d 884 (1969) the mother was proven emotionally unstable and prior to the divorce left a baby 13 months old, purportedly for a two week vacation, failing to return until a five and one half month period had elapsed. The facts in the case at bar present no similiarity to the *Hyde* case.

SUMMARY

While as the trial court stated it may be true that some of Mrs. Coxes actions may be lacking in propriety and judgment, the cases are clear that that situation, or even outright adultery, will not render the mother unfit to have the custody of her children. The cases are unanimous in proclaiming that unless such unfitness is shown, or an abuse of discretion by the trial court manifested, the Court will not reverse the lower court's ruling on appeal.

It is respectfully submitted that the judgment of the trial court be affirmed and that the custody of the four minor children remain with their Mother, who as the evidence indicates is a fit and proper person to have their care, custody and control.

POINT II.
THE PROPERTY AND ALIMONY SETTLEMENT

RENDERED BY THE TRIAL COURT WAS UNJUST AND INEQUITABLE.

It is well settled that, as property division decisions are equitable proceedings, upon appeal the Supreme Court may review both law and facts. Constitution of Utah, art. 8, par. 9, *Dahlberg* v. *Dahlberg*, 77 Utah 157, 292 P. 214, (1930); *Steed* v. *Steed*, 54 Utah 244, 181 P 445, (1919); *Clawson* v. *Wallace*, 16 Utah 300, 52 P 9, (1898).

A. The wife is generally entitled to one-third of the property.

In *Griffen* v. *Griffen*, 18 Utah 98, 55 P 84, (1898), the Court expressed the general rule that, upon divorce, the wife takes one-third of the property of the marriage. However, this is not an absolute rule; it depends, in each case, on the particular facts and the equities of the situation. For example, in *Woolley* v. *Woolley*, 113 Utah 391, 195 P.2d 743, (1948), the wife was awarded about one-third of the property, but she was not given any part of some mining interest which her husband owned. The Court found this to be error because it denied her the right to share in the possible increase in the stock's value. Therefore, the Court ordered the trial court to keep continuing jurisdiction in order to increase the award in the event the stock went up.

Where the wife has contributed to the marriage in substantial part, she is entitled to more than one-third. In *Lundgreen* v. *Lundgreen*, 112 Utah 31, 184 P.2d 670, (1947), the husband purchased a home for $395.00. The wife spent part of her funds, and a considerable amount of time, in remodelling and decorating the house. The trial court granted the wife the furniture,

some of which she had owned prior to the marriage, and some of which they had accumulated after the marriage. The Court found this to be error, saying she should have been given one-half the value of the house in excess of $395.00. If, in addition to contributing to the marriage, the wife's earning ability has not increased while the husband's has, the wife may be entitled to as much as 80%. In *Tremayne* v. *Tremayne*, 116 Utah 483, 211 P.2d 452, (1949), the Court found no error in an award to the wife of $1,651.00 out of $2,057.00. The Court noted that the wife had been employed throughout the marriage while the husband had attended school, and his earning ability had been substantially increased while hers, at best, had remained the same. A similar case is *Pinion* v. *Pinion*, 92 Utah 255, 67 P.2d 265, (1937). There, after a marriage of only four years, the wife was given $2,000.00, one-half the total $4,000.00 the couple owned. It was noted that she had been a store clerk prior to the marriage, but had given up her job, and any hopes of advancement, upon marriage.

B. The purpose in dividing property is to permit the parties to reconstruct their lives.

It was said in *Wilson* v. *Wilson*, 5 Utah 2d 79, 296 P.2d 977, (1955), that the purpose in property division is to permit reconstruction of lives. Except in marriages of extremely short duration, where neither's economic position has been substantially altered, this does not mean placing the parties as they were before marriage. In *Wilson*, the husband and wife had been married for 15 years, during which time the husband earned between $80.00 and $300.00 per month, but always enough to keep them comfortable. The Court affirmed an award to the wife of the house, valued at $19,000.00 to $20,000.00, with a $9,352.74 mortgage; a second home valued between $4,000.00

and $5,000.00; stock worth $545.90; a joint bank account of $827.39; and a tax check of $161.10. It said that the wife was entitled to some compensation for her 15 years of service to her husband. In *Bullen* v. *Bullen*, 71 Utah 63, 262 P 292, (1928), the husband had inherited $25,000.00 in property from his father, which, at the time of the divorce was subject to $5,000.00 in debts. Even though the wife had contributed nothing in the way of accumulating the property, she was awarded $2,250.00, and the husband was directed to pay $3,150.00 in notes jointly signed by both.

Since the purpose of property division is to reconstruct lives, the question to be answered in determining if the division was sufficient is not can the parties sustain themselves, but can they maintain themselves in the manner to which they are accustomed. *Ring* v. *Ring*, 29 Utah 2d 436, 511 P.2d 155 (1973). In that case, during the marriage both the husband and wife were employed as practicing physicians. The husband earned about $29,000.00 per year in private practice, while she earned $7,000.00 with the public health department. Upon divorce, she was granted alimony of $600.00 per month and child support of $200.00 per month. She then moved to San Francisco, where she began to earn about $26,000.00 per year. The trial court then reduced the alimony to $1.00 per year. The Supreme Court reversed, saying that much of her new earnings were likely eaten up by increased expenses, and, though she could very easily survive, her lifestyle would not be that to which she had become accustomed.

In divorce cases, the wife is entitled to at least one-third of the property, as a rule of thumb. This is increased depending on the circumstances, especially if the wife has contributed to the accumulation of property, or had her earning ability impaired

by the marriage. Even if she has done neither, she may be entitled to more as compensation for her years of service.

In *Weaver* v. *Weaver*, 21 Utah 2d 166, 442 P.2d 928, (1968), the Court awarded the wife one-half of the accumulated assets. In *Weaver*, similar to the case presented here, the Defendant was a physician specializing in Urology and from his practice and by careful management accumulated assets of approximately $250,000.00. Largely through the growth of stock an additional asset accumulation of $500,000.00 resulted. A large portion of the stock was acquired by the husband by purchasing or as gifts from his father and sister. The Supreme Court subsequently upheld an equal division of the assets.

In *Sorensen* v. *Sorensen*, 14 Utah 2d. 24, 376 P.2d 547 (1963), the Supreme Court upheld a trial court award of a half interest in a home of the parties, the rental property, a substantial life insurance policy on the husband, a country club membership and some personal property. In addition to a one-half interest in the above mentioned property, the husband was ordered to pay $1,250.00 per month alimony to the wife, notwithstanding that all of the children had reached the age of majority and that never during the marriage had the wife been a breadwinner. In upholding the decision of the District Court, the Supreme Court stated:

> *"It is apparent from the Court's distribution of the property that the husband was left with the wherewithal to continue producing a substantial sum of money and also substantial interests in real and personal property were allowed to be retained by him, so that it does not appear he will be greatly hindered in the mode of living to which he has accustomed himself. The wife has been given some income producing property, as well as alimony, so that she can continue living*

in the style to which she has become accustomed during the marriage. Under such circumstances, this Court cannot say that there has been a plain course of discretion or that the awards are unjust or inequitable." Id at 548.

The Supreme Court has on numerous occasions indicated that consideration must be given to all of the attendant facts and circumstances including: the duration of the marriage; the ages of the parties; their social positions and respective standards of living; considerations relative to the children; the money and property possessed by the parties and its manner of acquisition; the training and capabilities of the respective parties and their present and potential incomes. *Wilson* v. *Wilson*, 5 Utah 2d 79, 296 P.2d 977 (1956); *Pinion* v. *Pinion*, 92 Utah 255, 67 P.2d 265 (1937); *Allen* v. *Allen*, 109 Utah 99, 165 P. 2d 872 (1946). *The facts in the present case indicate that the parties have accumulated since their marriage assets aggregating a value of $292,101.00. (Tr. 147, 148, 151, 152, 155, 156, 157, 159, 161-165, 166-169, 210, 404, 405, 411, 410-415)* In reviewing the Memorandum Decision issued by the Trial Court, we note that the Trial Judge indicated that he did not have the benefit of a transcript in arriving at the value of $210,000.00. The record clearly indicates that the value of the assets accumulated by the parties totals $292,101.00. Based upon the Trial Court's determination that the Plaintiff was entitled to an alimony and property settlement of one-third, the net property settlement due to the Plaintiff would be in the sum of $97,367.00. The Trial Court, in its Memorandum Decision of December 14, 1973, indicated that dividing $290,000.00 by one-third as Plaintiff's share would be $87,087.00. (Mem. Dec. 4) The Trial Court's determination as to a one-third value of $290,000.00 appears to be in error, one-third of $290,000.00 being in the sum of $96,667.00. The Trial Court further indicated that the one-third figure must be discounted by a maximum of one-fourth or by a

minimum of one-fifth (Mem. Dec. 4) Discounting the one-third by the maximum figure, Plaintiff's present day equity would be $72,500.00 or discounting the one-third figure by the minimum figure of one-fifth, Plaintiff's award would be $77,334.00. We can find no case authority purporting the propriety of reducing the equity figures by the maximum or minimum amounts cited in the trial court's Memorandum Decision. Assuming the properties were ordered sold or awarded in-kind consistent with Plaintiff's Motion for an in-kind Distribution, the Plaintiff's present day equity would be substantially near the figure of $96,667.00.

The record fully substantiates the contribution of the Plaintiff relative to the accumulated assets of the parties. *The Plaintiff worked on a full time basis in various capacities in an effort to defray living expenses while Dr. Cox attended Dental School. (Tr. 7,8) Subsequent to the Coxes moving to St. George in 1964, Mrs. Cox worked in the office of Dr. Cox as a Receptionist and Assistant for a period of three years, for an eight year period subsequent to 1964, Mrs. Cox was employed as a Bookkeeper for the Defendant, Mervyn K. Cox, at a salary of $350.00 per month, which amount was deposited in a Savings Account and as the Defendant's testimony indicated was utilized to purchase the Bentley-Sullivan Farm, having a net value of $66,420.00. (Tr. 11, 12, 13, 28, 121, 407, 408, 450, 451) The testimony further indicated that the Bentley-Sullivan Farm is adjacent to a Farm owned by the Plaintiff's Family, which would have been conducive to an in-kind distribution of the assets by the Trial Court. (Tr. 443)* Inasmuch as the salary of the Plaintiff was utilized to acquire the Bentley-Sullivan Farm, it would appear reasonable that the Trial Court should have awarded an in-kind distribution of the assets, including the Carter and Whitney Promissory Notes which could be utilized in retiring the encumbrances remaining to be paid on the Bentley-Sullivan Farm.

The evidence clearly indicates that the Defendant has a substantial income producing ability. The parties had a taxable income of $21,837.00 in 1969, $25,465.00 in 1970 and $17,869.07 in 1971. (Tr. 356,357,358)

As the Supreme Court has reiterated in numerous decisions, the primary purpose of a property division is to reconstruct lives, the question to be analyzed in determining the sufficiency of a property division being not whether the parties can sustain themselves, but can they maintain themselves in the manner to which they are accustomed. *The uncontroverted testimony of the Plaintiff established that she and her children need approximately $1,019.00 per month to maintain the standard of living to which they have been accustomed. (Tr. 26, 27)* Under the facts and circumstances of this case, it is difficult to understand how the Plaintiff can continue to maintain that standard of living on a child support allowance of $500.00 per month and a cash alimony and property settlement in the amount of $60,000.00. As the Court indicated in the *Ring Case* much of the wife's new earnings were likely to be eaten up by increased expenses. In these inflationary times, it is not difficult to foresee that the costs and expenses of supporting and maintaining a standard of living to which the Plaintiff and her children have been accustomed will necessitate an invasion into the cash alimony and property settlement awarded by the Trial Court.

The Defendant, on the other hand, should have little difficulty in maintaining the standard of living to which he has been accustomed. As the evidence clearly indicates, he possesses substantial income producing ability and pursuant to the award made by the Trial Court has substantial interest in other real and personal properties, including the Carter and Whitney Promissory Notes aggregating receivables in the amount of

$50,000.00 plus interest. The testimony further indicates the real properties, including the Kemp Corners Properties, Apartment in the home, Farm Properties and Car Wash Property, to have substantial income producing capabilities. The lump sum alimony and property settlement award to Plaintiff has little income producing ability, save and except investment interest thereon which will provide little hedge against inflationary expenses.

SUMMARY

Depending on the circumstances, particularly such as those in the instant case where the wife has contributed to the accumulation of property or had her earning ability impaired, the Court has been inclined to award an equal division of the accumulated assets.

We respectfully submit that the Judgment of the Lower Court regarding the lump sum alimony and property settlement be reversed and modified to the extent that Plaintiff receive the Bentley-Sullivan Farm Property together with the Carter and Whitney Promissory Notes which can be utilized to pay the respective encumbrances, the 1972 Chevrolet Station Wagon and such additional cash award as in the Courts Judgment will approximate an equal division of the aggregate net cash value of the accumulated assets of the parties and to the extent that the Defendant receive the home located in St. George, Utah, the Syphus Farm, the one-third equity interest of the parties in the Car Wash Property, the Kemp Corners Property including the service station and building complex located thereon, the Kolob and Pine Valley Lots, the one-seventh equity interest of the parties in the Prince Medical Complex, the Buick Automobile, the Ford Pickup, the Boat and Trailer, the one-fourth interest in the Airplane, the 2 Snowmobiles and Trackster, the Convertible

Bond, the U & I Sugar Stock, the American Western Life Insurance Stock, the Freedom Holding Company Stock, the Bloomington Country Club Membership, the Dental Equipment and the Savings Account in the St. George Savings & Loan.

Respectfully Submitted
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